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MAR 11 2010

In re Patent No. 7,188,138	:	DECISION ON PETITION
Issue Date: March 3, 2007	:	UNDER 37 CFR 1.78(a)(3)
Application No. 10/604,626	:	AND REQUEST FOR
Filed: August 5, 2003	:	CERTIFICATE OF CORRECTION
Attorney Docket No. 93766	:	

This is a decision on the petition, filed November 20, 2009, which is being treated as a petition under 37 CFR 1.78(a)(3), seeking to add a claim for priority under 35 U.S.C. § 120 to non-provisional Application No. 10/604,626, filed August 5, 2003, by way of a certificate of correction.

The petition under 37 CFR 1.78(a)(3) is **DISMISSED**.

A petition for acceptance of a claim for late priority under 37 CFR 1.78(a)(3) is only applicable to those applications filed on or after November 29, 2000. Further, the petition is appropriate only after the expiration of the period specified in 37 CFR 1.78(a)(2)(ii). In addition, the petition under 37 CFR 1.78(a)(3) must be accompanied by:

- (1) the reference required by 35 U.S.C. § 120 and 37 CFR 1.78(a)(2)(i) of the prior-filed application, unless previously submitted;
- (2) the surcharge set forth in § 1.17(t); and
- (3) a statement that the entire delay between the date the claim was due under 37 CFR 1.78(a)(2)(ii) and the date the claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

The petition does not comply with item (1).

37 CFR 1.78(a)(2)(i) requires that any non-provisional application claiming the benefit of one or more prior-filed copending non-provisional applications must contain or be amended to contain a reference to each such prior-filed application, identifying it by application number (consisting of the series code and serial number) and indicating the relationship of the applications. The

relationship between the applications is whether the subject application is a continuation, divisional, or continuation-in-part of a prior-filed non-provisional application. An example of a proper benefit claim is: "This application is a continuation of Application No. 10/---, filed---." A benefit claim that merely states: "This application claims the benefit of Application No. 10/---, filed---," does not comply with 37 CFR 1.78(a)(2)(i) since the proper relationship, which includes the type of continuing application, is not stated. Also, the status of each non-provisional parent application (if it is patented or abandoned) should also be indicated, following the filing date of the parent non-provisional application. See MPEP Section 201.11, Reference to Prior Non-provisional Applications. The amendment fails to comply with the provisions of 37 CFR 1.78(a)(2)(i) and is therefore unacceptable.

The amendment presented in the Certificate of Correction is unacceptable as presented because the present application was filed August 5, 2003 and application 09/683,491 became abandoned on May 4, 2003 for failure to respond to the final rejection of February 4, 2003, therefore the applications were not copending at the time the present application was filed. Further 09/532,350 does not claim benefit of 60/175, 825, 60/160,125 and 60/125,531.

As authorized, the \$1,410 surcharge fee, as well as the \$100 certificate of correction fee, will be charged to petitioner's credit card.

If reconsideration of this decision is desired, a renewed petition under 37 CFR § 1.78(a)(3) and the certificate of corrections must be submitted.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITIONS
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Any questions concerning this matter may be directed to April M. Wise at (571) 272-1642.

/dab/
David Bucci
Petitions Examiner
Office of Petitions